Supreme Court, U. S.
FILED
AUG 26 1980
MICHAEL RODAK, JR., CLE

80-286

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROSEMARIE C. WOOTERS, ET AL.,

PETITIONERS,

V.

MARY D. JORNLIN, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ELWYN EVANS, JR.
512 Market Tower
Wilmington, DE 19801
(302) 656-5999
Attorney for
Petitioners

QUESTIONS PRESENTED

1. Where local law prohibits the passage of title to new-home-buyers without an administrative finding based on a record of building inspections that the home complies with code and is entitled to a certificate of occupancy ("CO"), does the issuance of a CO without evidence that the inspections have been performed deprive the new-home-buyers of due process rights?

2. Where the inspection record shows that inspections have not been performed or code violations have not been corrected do new-home-buyers have a claim of entitlement to be relieved of their contractual obligation to purchase?

3. Does the arbitrary issuance of a CO provide the new-home-buyers with constitutionally sufficient notice to seek revocation of the CO at an administrative hearing provided by local law?

4. Does the arbitrary issuance of a

CO which destroys the new-home-buyers' right of rescission constitute deprivation of property under color of state law?

PARTIES

Petitioners (Plaintiffs Below)

ROSEMARIE C. WOOTERS
GLENN WOOTERS
PATRICIA JOHNSON
DONALD JOHNSON
CYNTHIA LOVELESS
HARRY LOVELESS
On behalf of themselves and all other residents of Brookmont Farms, a residential development in New Castle County, Delaware

Respondents (Defendants Below)

MARY D. JORNLIN, individually and as County Executive of New Castle County
HENRY J. FOLSOM, JR., individually and as former acting County Executive of New Castle County
MELVIN SLAWIK, individually and as former County Executive of New Castle County
ALBERT W. MADORA, individually and as Director of New Castle County Department of Public Works
STEPHEN KOWALCHUK, JR., individually and as Director of Development and Licensing of the New Castle County Department of Public Works
WARREN O'SULLIVAN, individually and as former acting Director of Development and Licensing of the New Castle County Department of Public Works
EDWARD F. PETERSON, individually and as former Director of Development and Licensing of the New Castle County Department of Public Works
THOMAS FEDE, individually and as Chief Building Inspector of the New Castle County Department of Public Works

JAMES CUNANE, JOHN DUGAN, ROBERT ROBERTO and CLIFFORD TURNER, individually and as building inspectors of the New Castle County Department of Public Works
NEW CASTLE COUNTY, a political subdivision of the State of Delaware
DAVID BILOON, individually and as Director of Lines and Grades of the New Castle County Department of Public Works
MARYLAND NATIONAL BANK, a National Bank chartered in the State of Maryland
MR REAL ESTATE CO., a Delaware corporation

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PARTIES	3
TABLE OF AUTHORITIES	6
OPINIONS BELOW	8
JURISDICTION	8
CONSTITUTIONAL AND STATUTORY PROVISIONS	9
STATEMENT OF THE CASE	11
REASONS FOR GRANTING THE WRIT	16
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Baldwin v. Hale 68 U.S. 223 (1864)	26
Biloon's Electrical Service, Inc. v. City of Wilmington Del. Super., 401 A.2d 636 (1979)	23
Board of Regents v. Roth 408 U.S. 564 (1972)	24,30
Canty v. Board of Education, City of New York, 312 F.Supp. 254 (SD NY 1970)	17
Garvey v. Freeman 397 F.2d 600 (Cir. 10 1968)	17
Goss v. Lopez 419 U.S. 565 (1975)	23
Memphis Light, Gas and Water Division v. Craft 436 U.S. 1 (1978)	26,29
N.L.R.B. v. Jones and Laughlin Steel Corp. 301 U.S. 1 (1937)	22
OKC Corp. v. Oskey Gasoline and Oil Co. 381 F.Supp 865 (ND Texas 1974)	17
Owen v. City of Independence ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)	28,29
United States v. Classic 313 U.S. 299 (1941)	27

	Page
Washington ex rel. Seattle Title and Trust Co. v. Roeberge 278 U.S. 116 (1928)	22
Yick Wo v. Hopkins 118 U.S. 356 (1886)	22

Treatises

McQuillin Mun. Corp. (3rd Ed.) §53.04b	23

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is not yet reported. It is set out in the Appendix hereto at pages A1 to A5. The opinion of the United States District Court for the District of Delaware is reported at 477 F.Supp. 1140 (1979). It is set out in the Appendix at pages A6 to A42)

JURISDICTION

The opinion and order of the United States Court of Appeals for the Third Circuit were filed on May 28, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

These provisions are set forth verbatim in the Appendix.

United States Constitution

Due Process Clause of the Fourteenth Amendment

United States Code

42 U.S.C. §1983

Delaware Code

9 Del. C. §1361

9 Del. C. §1362

9 Del. C. §1363

16 Del. C. §8303

16 Del. C. §8306

16 Del. C. §8307

16 Del. C. §8308

16 Del. C. §8314

16 Del. C. §8315

16 Del. C. §8317

New Castle County (NCC) Code

NCC Code §2-44

NCC Code §2-66

NCC Building Code §111.5

NCC Building Code §120.1

NCC Building Code §120.6

STATEMENT OF THE CASE

Petitioners Rosemarie C. Wooters and five other homeowners ("Plaintiffs") are resident homeowners of Brookmont Farms, a housing development in New Castle County, Delaware. Brookmont Farms consists of single family dwellings which had been planned, constructed and sold as low and moderate income housing.

Prior to obtaining title to their homes, plaintiffs, through their attorneys, obtained certificates of occupancy ("CO's") from New Castle County. The CO's certified, inter alia, that they complied with the provisions of the Building Code.*

Only after the plaintiffs occupied their homes did they discover that they grossly failed to conform to Building Code specifications. The defects discovered

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*Building Code § 120.6 (A60)

were of a kind and magnitude which indicated that the County had not performed the inspections required by the Code at various stages of construction.

Plaintiffs filed suit in the Federal District Court for the District of Delaware as individuals and on behalf of all similarly situated homeowners in Brookmont Farms.[1] Plaintiffs' principal claim, and the one upon which they now seek review, was asserted against New Castle County and certain of its employees (collectively referred to as "County defendants") based on their utter failure to perform the inspections required by state and county codes. Amended Complaint, ¶14(a) and (d) (A68-A69).

Since the District Court misread plaintiffs' complaint as stating a mere

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[1]At the time the action was dismissed by the District Court, it had not yet been certified as a class action.

tort claim against the County, certain key paragraphs are repeated verbatim below:

> 12. Had the County defendants complied with their statutory duties and revoked or refused to issue CO's and other licenses to the Builder, plaintiffs would have been made aware of the defective construction and would then have been able to cancel their contracts to purchase the houses and/or institute legal proceedings against the Builder, thereby minimizing their damages.
>
> 15. As a direct result of the County defendants' conduct, the homes purchased by plaintiffs were not in the statutorily mandated physical condition as represented by the CO's, and consequently the actual value of the home was only a small fraction of the amount plaintiffs paid for them.
>
> 16. As a further direct result of the County defendants' conduct, plaintiffs have been forced to expend sums of money; (a) in unsuccessful attempts to cure the construction defects in their homes; and (b) in meeting extraordinary operating expenses, including, but not limited to, excessive insurance premiums for minimal coverage and excessive heating and cooling costs.
>
> 19. The County defendants' actions constitute a violation of

> plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 (1976), because those actions have deprived plaintiffs of their property rights without due process of law.
>
> 20. The County defendants' actions were carried out in accordance with a custom and practice of defendant New Castle County, and therefore the County itself is liable for all losses that plaintiffs have suffered, under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 (1976).

Federal question jurisdiction was grounded on 28 U.S.C. § 1343 (3) and (4). Under principles of pendent jurisdiction plaintiffs also asserted various state law claims against MR. Real Estate, the developer of Brookmont Farms and against Maryland National Bank, which supplied construction and permanent financing for the project. Full exposition of these pendent jurisdiction claims is not necessary in this petition.

The District Court dismissed plaintiffs' action in toto, finding that the complaint failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983 (1976). (Opinion and Order of the District Court per Latchum, J. A6-A42) The United States Court of Appeals for the Third Circuit affirmed the dismissal (Opinion and Order of the Court of Appeals, A1-A5)

The petitioners now seek review of these decisions by writ of certiorari.

THE QUESTIONS ARE SUBSTANTIAL

I. THE BUILDING INSPECTORS' DETERMINATION THAT HOMES WERE ENTITLED TO COS WITHOUT SUPPORTING EVIDENCE DENIED PLAINTIFFS SUBSTANTIVE DUE PROCESS OF LAW.

Under local law a certificate of occupany constitutes a certification that a new home conforms to the building code.* 16 Del.C. §8308(a) (A51) requires that the building inspector** maintain a comprehensive record of inspections. A CO is to be issued when the building is entitled thereto.* Thus the issuance of

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*Building Code § 120.6 (A60)

**16 Del.C. § 8303 (1943) (A51) requires New Castle County to appoint a building inspector. His functions were transferred to the Department of Development and Licensing by 9 Del.C. §1361 (1967) (A44). New Castle County Code Sec. 2-66 (1977) (A58) transfers these functions again to the Department of Public Works. For convenience plaintiffs refer to the building inspector throughout this petition.

a CO necessarily implies both that the requisite inspections have been made and that reference has been made to the inspection record in issuing a CO.

Plaintiffs complain, inter alia, that the requisite inspections were not performed. It follows that the record upon which COs were issued evidenced the lack of inspections. A determination that the home is entitled to a CO constitutes an administrative finding that the home complies with code. An administrative decision which is not supported by evidence is inherently arbitrary and capricious and lacking in due process. Garvey v. Freeman, 397 F2d 600 (Cir. 10 1968); Canty v. Board of Education, City of New York, 312 F.Supp. 254 (S.D. N.Y. 1970); OKC Corp. v. Oskey Gasoline & Oil Co., 381 F.Supp. 865 (N.D. Tex. 1974).

Both the District Court and Court of

Appeals opinions blatantly ignored this denial of plaintiffs' constitutional rights. Although the Third Circuit opinion acknowledged that "plaintiffs allege to have suffered serious injuries as a result of the defendants' actions", it cryptically concludes that "the pleadings simply do not set forth any federal constitutional basis for recovery as required by 42 U.S.C. § 1983 (1976)." (A2)

II. WHERE THE INSPECTION RECORD IS INSUFFICIENT TO JUSTIFY THE ISSUANCE OF A CO THE NEW HOME BUYER WILL BE RELIEVED OF HIS CONTRACTUAL OBLIGATION TO PURCHASE A HOME.

Delaware examination and certification of title is performed by lawyers. Such lawyers, representing the buyer, prepare documents and hold real estate settlements. Before recording a deed which conveys title from the developer-builder to his client the settlement lawyer must obtain a CO.* If the County refuses to issue a CO the seller cannot fulfill his contractual commitment to provide "good and marketable title such as will be insured by a licensed title company."**

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*Building Code 120.1 (A59)
**New Castle County Board of Realtors, Inc. Sales Contract, Standard Form Number 1

In the instant case routine inspections would have disclosed numerous Building Code violations in the construction of plaintiffs' homes and the appearance of such violations in the inspection record should have precluded the issuance of COs and thus prevented the passage of title from the incompetent builder to plaintiffs.

In dismissing the complaint for failure to state a cognizable federal claim the District Court concluded that neither State nor County codes provided the new-home-buyer with a protected property interest in building inspections. This conclusion was based on an erroneous reading of the decisions of this Court and of local law. It must be reversed.

Without citing any pertinent state court decisions the District Court reads

"shall inspect"* as enacted by the Delaware General Assembly as "may inspect"**, thereby conferring unfettered administrative discretion on the building inspector. This interpretation of the law ignores other pertinent statutory provisions,*** violates compelling cannons of statutory construction and renders the entire County regulation of new construction void and unconstitutional.

If the building inspector has no mandatory duties, a single public official could decide arbitrarily who may take title to property in New Castle County. An

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*9 Del. C. §1361 (A44)
** District Court Opinion (A23-A26)
*** The building inspectors duty to inspect is prescribed by 16 Del. C. §8307 (A53) Other pertinent provisions contained in Chapter 83, Title 16 Del. C. are:
§8306.Building Inspector-Powers and duties (A51)
§8314.Use and maintenance of buildings erected in violation of code (A55)
§8315.Penalties (A56)
§8317.Exceptions (A56)

ordinance which confers arbitrary power to give or withhold consent is constitutionally defective. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Assuming arguendo that the pertinent law permitted inspections to be viewed as either mandatory or permissive, the unconstitutional choice must be avoided. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 30 (1937). More significantly, when a governmental entity undertakes to regulate the use, ownership or right to enjoy real property it must do so in a manner consistent with the Fourteenth Amendment. If the regulation of land use rests upon uncontrolled discretion, it is without rational basis and deprives the landowner of property without substantive due process of law. Washington ex rel. Seattle Title and Trust Co. v. Roeberge, 278 U.S. 116 (1928).

Since building inspections must be mandatory plaintiffs have a protected property interest in those inspections[1].

Where regular inspections are not made, the inspection record must reflect the absence of such inspections. On such a record a CO may not issue and title must not pass to the buyer. This chain of benefits is clearly required by local law and, for

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[1]The District Court asserts that to claim a protected property interest in a governmental service the aggrieved party must show that the duty to provide such service is owed to discrete individuals rather than the undifferentiated general public. Some states have limited the tort liability of municipalities by employing this distinction. McQuillin Mun. Corp. (3rd Ed.) § 53.04b. Delaware has not. Biloon's Electrical Service, Inc. v. City of Wilmington, Del. Super., 401 A.2d 636 (1979). The District Court reads Goss v. Lopez, 419 U.S. 565 (1975) as supporting this "unarticulated" limitation on civil rights liability. Neither Goss nor any other decision of this Court supports this limitation.

that reason, is more than a mere expectancy; it is a claim of entitlement. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

III. DUE TO INSUFFICIENT NOTICE PLAINTIFFS WERE DEPRIVED OF AN OPPORTUNITY FOR HEARING BEFORE THE BOARD OF LICENSE INSPECTION AND REVIEW.

A CO falls within the definition of license provided by 9 Del.C. § 1362(1). (A48) Any person aggrieved by the issuance of a license may appeal to the Board of License Inspection and Review, authorized by 9 Del.C. § 1363 (A49) and established by New Castle County Code, Section 2-44 (A57). This board may "reverse, vacate or revoke the action appealed; provided that such action shall be affirmed if the action was not arbitrary or capricious and was taken pursuant to law."

With adequate notice plaintiffs could have appealed to this board and sought revocation of the COs. "Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be

notified" Baldwin v. Hale, 68 U.S. 223, 233 (1864). Issuance of the CO - the notice plaintiffs received - misrepresented the County's action as regular rather than arbitrary and mislead them into believing that their interests were being protected rather than being adversely affected. A more egregious failure of the notice requirements of procedural due process is difficult to imagine. Compare Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) where the utility customers were aware of termination of service but uninformed as to the avenues of redress.

IV. THE BUILDING INSPECTORS' ARBITRARY ISSUANCE OF A CO WAS STATE ACTION.

"Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" is action taken under color of state law. United States v. Classic, 313 U.S. 299, 326 (1941)

By local law the building inspector is clothed with immense power in determining whether a home should be used, occupied and owned. Plaintiffs were injured by the arbitrary exercise of this power.

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished consitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been

> established to protect the very rights it has transgressed. Owen v. City of Independence, ____ U.S. ____, 100 S.Ct. 1398, 1415, 63 L.Ed.2d, 673, 693 (1980).

The District Court clearly erred in concluding that plaintiffs' damages were unrelated to arbitrary issuance of COs by the building inspector.

CONCLUSION

The decisions below in effect exempt the regulation of building construction by local governments from the constraints of the Fourteenth Amendment and from consequential civil rights liability. This result finds no support in the decisions of this Court and is particularly repugnant to its decisions in Memphis Light, Gas & Water Division v. Craft and Owen v. City of Independence.

To achieve this result the District Court applies uniquely restrictive criteria for determining whether a citizens' reliance on a governmental service is protected under the Fourteenth Amendment. According to the District Court the aggrieved parties "must point to (1) an independent source of authority (2) that establishes an absolute duty (3) that is owed to them

as individuals rather than as members of the undifferentiated public." (A19-A20) This formulation gratuitously adds two requirements to the "independent source" test prescribed by this Court in Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

For the foregoing reasons, this Court should issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ELWYN EVANS, JR.
512 Market Tower
Wilm., DE 19801
Attorney for
Petitioners

A P P E N D I X

APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Third Circuit	A1
Order	A4
Opinion of the United States District Court for the District of Delaware	A6
Order	A42
United States Constitution	
Due Process Clause of the Fourteenth Amendment	A43
United States Code	
42 U.S.C. § 1983	A43
Delaware Code	
9 Del.C. § 1361	A44
9 Del.C. § 1362	A48
9 Del.C. § 1363	A49
16 Del.C. § 8303	A51
16 Del.C. § 8306	A51
16 Del.C. § 8307	A53
16 Del.C. § 8308	A54
16 Del.C. § 8314	A55

Table of Contents cont'd. Page

16 Del.C. § 8315 A56

16 Del.C. § 8317 A56

New Castle County (NCC) Code

NCC Code § 2-44 A57

NCC Code § 2-66 A58

NCC Building Code § 111.5 A59

NCC Building Code § 120.1 A59

NCC Building Code § 120.6 A60

Plaintiffs' Amended Complaint A61

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 79-2595

ROSEMARIE C. WOOTERS, et al.,

Appellants,

v.

MARY D. JORNLIN, et al.,

Appellees.

On Appeal from the United States
District Court for the
District of Delaware
C.A. No. 78-0404

Argued May 23, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM, Circuit Judges.

(Filed: May 28, 1980)

OPINION OF THE COURT

PER CURIAM.

This is an appeal from a final judgment dismissing claims against all the defendants. The district court dismissed the claims against all defendants except for the Maryland National Bank for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The pendent claims against the Bank were dismissed for lack of federal subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Although the plaintiffs allege that they have suffered serious injuries as a result of the defendants' actions, and may well be able ultimately to prevail on their claims in state court, the pleadings simply do not set forth any federal constitutional basis for recovery as required by 42 U.S.C. § 1983 (1976). Accordingly, for the reasons stated in the district court's opinion, Wooters v. Jornlin, 477 F. Supp. 1140 (D. Del. 1979),

we conclude that the dismissal of the claims under Rule 12(b)(6) was not error. Inasmuch as the district judge did not abuse his discretion in choosing not to retain jurisdiction over the pendent state claims against the Bank, Rogin v. Bensalem Township, No. 79-1361, slip op. at 32-33 (3d Cir. filed Feb. 21, 1980), the dismissal of those claims also was not erroneous.

The judgment of the district court will be affired.

TO THE CLERK:

Kindly file the foregoing per curiam opinion.

_____
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 79-2595

ROSEMARIE C. WOOTERS, et al.,

Appellants,

v.

MARY D. JORNLIN, et al.,

Appellees.

(D. C. Civil No. 78-0404)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on May 23, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court, filed September 20, 1979, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn

CLERK

May 28, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROSEMARIE C. WOOTERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No.
	)	
MARY D. JORNLIN, et al.,	)	78-404
	)	
Defendants.	)	

OPINION

LATCHUM, Chief Judge.

Rosemarie C. Wooters and five other homeowners ("Plaintiffs") of Brookmont Farms, a residential development in New Castle County, Delaware, commenced this action on their own behalf and all other homeowners of the development,[1] seeking damages and injunctive relief under 42 U.S.C. § 1983. The defendants are New Castle County, five building inspectors,

[1]This action has not yet been certified as a class action.

and various other county officials (the "county defendants"), Mr. Real Estate Co., the developer and builder of the homes in Brookmont Farms, and Maryland National Bank ("Bank"), a National Bank chartered in the State of Maryland, which financed both the building of Brookmont Farms, through a construction mortgage loan, and the purchasing of many individual homes, through permanent mortgage financing. Plaintiffs claim that jurisdiction exists by virtue of 28 U.S.C. § 1343(3) and (4) and "principles of pendent jurisdiction." The county defendants have moved to dismiss the complaint, pursuant to Rules 12(b)(1) and (6), F.R.Civ.P., contending that the Court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. The Bank also moved to dismiss for lack of subject matter jurisdiction. Rule 12(b)(1), F.R.

Civ.P. Because of the dispositions of these two motions, the Court finds it unnecessary to rule upon the other ground asserted by the Bank in support of its motion to dismiss.[2]

[2]The Bank also moved to dismiss the complaint, pursuant to Rule 12(b)(3), for improper venue. Mr. Real Estate Co. made no answer other than a statement in which it agreed to the entry of a default judgment. Plaintiffs have made no motion for the entry of such a judgment and no judgment has been entered. The plaintiffs' failure to make such a motion is not surprising since the complaint alleges that Mr. Real Estate Co. lacks assets with which it could satisfy any judgment.

I. THE FACTS

The following facts, here summarized, are taken from the plaintiffs' complaint and for the purpose of the present motions are accepted as true.[3] Plaintiffs are resident homeowners of Brookmont Farms, a housing development consisting of single-family dwellings which had been planned, constructed, and sold as moderate and low income housing. All of the plaintiffs in deciding to purchase their homes relied upon "assurances" given to them by the county defendants and the Bank that the homes had been constructed according to certain specifications. For the county defendants,

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[3] In considering defendants' motions to dismiss, the Court must be guided by the principle that the allegations of the plaintiffs' complaint must be accepted as true. Hall v. Pennsylvania State Police, 570 F.2d 86, 89, n.1 (C.A.3, 1978). Moreover, for purposes of a 12(b) motion, those pleadings must be considered in the light most favorable to the non-moving party, in this case, the plaintiffs. Oxford First Corp. v. PNC Liquidating Corp., 372 F.Supp. 191, 192-93 (E.D.Pa.1974).

the "assurances" took the form of certificates of occupancy ("CO's"), which had been issued on the homes by the county building inspectors. Plaintiffs contend that the requirements of the New Castle County Code[4] are such that the mere issuance of a CO by the county, as is required by the Code before title may be passed or a new building occupied,[5] constitutes a personal assurance to the buyer that the new building conforms in all respects to the provisions of the Code.

The alleged assurances from the Bank took the form of loan commitment letters given to the plaintiffs wherein the Bank represented that the plans and specifications

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[4]Sections 5-1 of the New Castle County Code (1975) specifies that the BOCA Basic Building Code, Sixth Edition (1975), with the additions and amendments contained in Sec. 5-2 of the New Castle County Code, shall be the Building Code for New Castle County. (Hereinafter cited as Building Code §). The relevant portions of that Code will be cited, infra.

[5]Building Code § 120.1 (1975).

for the model home had been approved by the Bank, that the homes financed by the Bank's mortgage loans would conform to the model except for extra items purchased by each individual buyer and that mortgage funds would not be disbursed until construction had been completed to the satisfaction of the Bank.

Only after the plaintiffs moved into their homes did they discover that the buildings failed, in numerous respects, to conform to the Building Code, to other county ordinances and to the plans and specifications of the model home. Plaintiffs contend that had the Bank performed in accordance with its loan commitment letters, plaintiffs would have been made aware of the inherently undetectible construction defects and, similarly, had the county made routine and thorough inspections and refused to issue CO's without full code compliance, the builder would have been unable to palm

off these defective dwellings to them. Thus, the county officers either negligently conducted the Code inspections or made none at all in accordance with the custom and practice known to all the county defendants.

Consequently, as a result of their detrimental reliance upon the Bank's representations and the county's negligent inspections, plaintiffs (1) were induced to pay much more for the buildings than their worth and (2) were caused to incur significant expenses in unsuccessful attempts to correct the defects and in meeting extraordinary operating expenses.

Basing jurisdiction on 28 U.S.C. § 1343(3) and (4), plaintiffs allege that the actions of the county defendants constitute a violation of plaintiffs' rights under the Fourteenth Amendment and 42 U.S.C. § 1983 in that "those actions have deprived the plaintiffs of their property rights without due process of law."

Finally, plaintiffs contend that the Bank's activities constituted a tort, that Mr. Real Estate Co.'s activities amounted to a breach of contract, and because these latter claims arise out of a common nucleus of operative facts, jurisdiction exists over the Bank and Mr. Real Estate Co. under "principles of pendent jurisdiction."

II. THE COUNTY DEFENDANTS' MOTION TO DISMISS

As previously noted, plaintiffs base their action against the county defendants on 42 U.S.C. § 1983 which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In order for a claim to exist under that statute, the plaintiffs must allege a deprivation of a constitutional right. Here the only right allegedly violated, and the only one that conceivably could be involved, is the Fourteenth Amendment right not to be deprived of property without due process of law.[6]

Although plaintiffs' complaint does not articulate with precision the property interests on which they rely, the Court has been able to identify three possible Fourteenth Amendment claims from their arguments and will proceed as if the plaintiffs had, indeed, been precise in defining their claims.

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[6]No liberty interest is alleged and the Court can conceive of none that could possibly be involved based on the facts alleged. The Court also notes that plaintiff's claim of a deprivation of their Fourteenth Amendment rights is not "wholly insubstantial and frivolous" and hence is sufficient to withstand the county defendants' 12(b)(1) motion to dismiss for want of subject matter jurisdiction. Bell v. Hood, 327 U.S. 678, 683 (1945).

First, plaintiffs argue that both Delaware State law and the New Castle County Code create a property interest in proper building inspections and that the county defendants' failure to conduct such inspections constitutes a deprivation of their property. Second, plaintiffs appear to contend that by inducing the plaintiffs to rely upon the county defendants' negligent inspections, the county defendants committed a tort and that the commission of that tort deprived them of property without due process. Third, they maintain that since the actions of the county defendants at least made it possible for Mr. Real Estate Co. to deprive the plaintiffs of property, then it can be said that the county defendants caused the plaintiffs to be deprived of property without due process. These three claims will be discussed seriatim.

1. Plaintiffs Have No Property Right To Building Inspections.

With respect to plaintiffs' first contention that they have a property interest in proper building inspections and the county defendants' failure to conduct such inspections deprived them of their property, the Court finds itself presented with the unusual claim that certain state and county laws have created a property interest in the provision of a government service. Because the claim for a general governmental service is somewhat different than the usual claim for specific welfare assistance, Goldberg v. Kelly, 397 U.S. 254 (1970), or for the retention of personal employment, Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974) it becomes necessary once again to consider the attributes of the notion of property protected by the Fourteenth Amendment.

Certain attributes of the notion are well established. First, one must show

some "legitimate claim of entitlement" and the claim of entitlement must also be grounded in and defined by some independent source of authority, such as state law. Goldberg v. Kelly, supra; Board of Regents v. Roth, supra; Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978).

Because of the novel nature of the claim in the present case, it is necessary to flesh out the notion of "entitlement" as that term would apply to the provision of a general government service. It is often said that for any right to exist, there must be some corresponding duty. Hence, if one wishes to claim a right to a general governmental service, he must show that the provider of the service has a duty to provide that service. If the furnishing of the service is left to the discretion of the provider then there can be no entitlement. But the demonstration of the existence of a duty alone is not enough to establish

individual entitlement. The party claiming the right must further show that the duty is owed to him as an individual rather than to the public at large. Of course, there could be some service which is owed to each and every individual in a political unit and hence could be considered a property interest. Nevertheless, in order to become a property the service must be owed to discrete individuals or individual entities. The Court is convinced that these principles, although unarticulated, have guided courts in the past. For example, in Goss v. Lopez, 419 U.S. 565, 573 (1975), plaintiffs were found to have a claim of entitlement to the provision of free education, a service, where Ohio law expressly directed local authorities "to provide a free education to all residents between five and 21 years of age." (Emphasis added). There, the duty imposed by state law ran directly to the plaintiffs as individual residents. On the other hand,

it has been held that laws providing the general public with police and fire protection do not grant individuals a property right in that protection. Shortino v. Wheeler, 531 F.2d 938, 939 (C.A.8, 1976); Reedy v. Mullins, 456 F.Supp. 955, 958 (W.D.Va.1978); Reiff v. City of Philadelphia, 471 F.Supp. 1262 (E.D.Pa.1979). All of these cases involved claims of entitlement to the provision of governmental services. Moreover, in all cases the defendants had a duty to provide those services. They reached opposite results only because in Goss the duty was owed to each resident in a certain age class while in Reiff, Shortino and Reedy, the duty was owed to the undifferentiated general public. Thus, the Court concludes that in order to establish the existence of a property interest in housing inspections, the plaintiffs must point to (1) an independent source of authority (2) that establishes an absolute duty (3) that is owed to them as

individuals rather than as members of the undifferentiated public.

(a) Delaware State law creates no right to building inspections.

Plaintiffs argue that 9 Del.C. § 1361[7] (1974) establishes a claim of entitlement under state law to building inspections

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[7]The relevant portions of § 1361 read:

§ 1361. Functions.

The Department of Development and Licensing, headed by a Director of Development and Licensing, shall perform the following functions:

(1) The Department, except as otherwise specifically provided in this title, shall administer and enforce all statutes, ordinances, and regulations for the protection of persons and property from hazards, in the use, occupancy, condition, erection, alternation, maintenance, repair, sanitation (including the maintenance and condition of plumbing and drainage facilities and the maintenance of sanitary conditions in housing accommodations), removal and demolition of buildings and structures or any parts thereof, and the grounds appurtenant thereto, in the operation of equipment therein, and of outdoor signs. The Department shall enforce compliance with the Zoning Code and regulations thereunder, subject to determinations made by the Board of Adjustment on appeals taken to it. (continued)

(Footnote 7 continued):

(2) The Department shall (i) issue all forms for applications and receive all applications for any license; (ii) determine whether the applicant is properly entitled to the license which he seeks; (iii) if the application is granted and the proper fee has been paid to the Department of Finance, issue the license to the applicant, either for itself or as agent for the officer, department, or board under whose jurisdiction the subject matter thereof falls; (iv) if the application is refused, notify the applicant in writing of the refusal and the reasons therefor. The requirements and standards to be met by applicants for licenses shall include those established by law. . .

(3) The Department shall make all inspections except as otherwise specifically provided in this title.

(4) The Department shall determine, as the result of its inspection, whether any person or owner of any property is violating the conditions of any license, or whether or not any property owner is violating any statute, ordinance or regulation which it is the duty of the Department to enforce. If the Department shall find a violation to exist, it shall forthwith make such order or take such other lawful action as may be necessary to correct the dangerous or unlawful condition, and if necessary it shall invoke the assistance of the County Attorney or the Department of Police, or both.

(5) The Department, whenever it finds that a holder of any license is violating the conditions thereof, and whenever the officer, department, or board as whose agent the Department granted the license directs the Department to do so, shall revoke, suspend or cancel the license. Any revocation, suspension or cancellation shall be in writing and shall state in detail the reasons therefor.

which are provided for by the County Code.[8]

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[8]In contending that § 1361 creates a duty to perform the inspections required by the County Code, the plaintiffs argue as follows: The statute requires that "the Department shall make all inspections," 9 Del.C. §1361(3) and that "the Department shall . . . determine whether the applicant is properly entitled to the license which he seeks", 9 Del.C. § 1361(2)(ii). The statute also provides that "The requirements and standards to be met by applicants for licenses shall include those established by law." 9 Del.C. § 1361(2). These provisions are said to incorporate any relevant county and municipal provisions. The New Castle County Building Code includes provisions which: (1) require that inspections of buildings be made during construction, § 111.1, and (2) require that before a CO can be issued a final inspection must be made and any Code violations or violations of the approved plans be noted, §111.5. 9 Del.C. § 1361 would incorporate these provisions, as well as other provisions of the Building Code specifying what the building standards should be, since they are laws which govern the "requirements and standards" for licenses and require inspections.

Plaintiffs cite other portions of the New Castle County Code which, on their face, create no duty for the county. Some cited sections are directed at builders and owners and seek to ensure that they comply with the code. Sections 113.1 and 120.1 of the Building Code and New Castle County Code Sections 6-18 fall into this category. Another provision relied upon by plaintiffs is clearly couched in non-mandatory language, using the word "will". That section, New Castle County Code Sec. 6-18, appears to be (continued)

The Court disagrees. According to this Court's interpretation of 9 Del.C. § 1361[9] (1974), that statute can create no property rights because it creates no mandatory duties. Rather, when read as a whole, the statute is a general grant of power or authority, defining the jurisdiction of the Department of Development and Licensing for New Castle County. Plaintiffs base their argument that 9 Del.C. § 1361 (1974) places mandatory duties on the county defendants upon the use of the word "shall" which appears throughout that provision. Although principles of statutory construction would generally interpret the word "shall" as creating a mandatory duty, in some instances it must be read in a non-mandatory sense. When affirmative words such

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(Footnote 8 continued):
a grant of jurisdiction. Finally, Building Code § 120.6 merely specifies the contents of a certificate of occupancy. The contents must include a certitication that the building complies with the code requirements.

[9]Apparently, no state court has had occasion to construe this provision.

as "shall" are employed and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised and not to the limits of the power or jurisdition itself, they may, and often have been, construed as directory rather than mandatory. This is so because in cases involving prospective action by government officials, the word "shall" may be given a merely directory meaning, if the law's purpose is the protection or organization of the government by guidance of its officials rather than the granting of rights to a private person. Triangle Candy Co. v. United States, 144 F.2d 195, 198 (C.A.9, 1944); International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Shapiro, 138 Conn. 57, 82 A.2d 345 (1951). Viewing the entire State Act in context, it appears to have used the word "shall" to mean "will" in the directory sense.

This conclusion is supported by the fact that when the General Assembly intended to create a mandatory duty in the same Legislative Act, as it does in 9 Del.C. § 1165(a) Subchapter IV (1974), it specified "It shall be the mandatory duty . . . ." Indeed, an examination of the original Legislative Act[10] (55 Del. Laws Part I, Chapter 85 (1965) renders further support for the conclusion, that the statute was a grant of powers. The section which became 9 Del.C. § 1361 is entitled "Functions" and the subchapter in which it is included appears among other subchapters defining the functions of other county departments. Undoubtedly, the word "shall" was used in these subchapters for the sole purpose of mandating the apportionment of various and discrete governmental functions

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[10] "An Act Providing For The Reorganization Of The Government of New Castle County And Amending and Repealing Existing Laws Pertaining Thereto." 55 Del. Laws, Part I, Chapter 85 (1965). 9 Del.C. § 1361 appears as subchapter IV § 1361 and is encoded as 9 Del.C. Part II.

among several different county departments.

This Court would certainly hesitate to find that the Delaware General Assembly intended to make the strict enforcement of the county building code mandatory in every respect. Housing and building codes are often laxly and haphazardly enforced. See, Note: Enforcement of Municipal Housing Codes, 78 Harv.L.Rev. 801-02, 804 (1965); Ackerman, Bruce A., Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L. J. 1093 (1971). Any requirement of strict enforcement could have many undesirable side-effects, such as necessitating larger staffs in the Department of Licensing, thereby diverting public tax funds from more pressing needs and could substantially increase constructions costs, thus making it more difficult, if not impossible, to provide for low and middle income housing.

For all of the foregoing reasons the Court declines to find that 9 Del.C. § 1361

(1974) creates mandatory duties without some clear statement from the Delaware General Assembly that it intended to create such duties. Because the county defendants have no absolute duty to perform housing inspections under state enacted law, plaintiffs have no state law entitlement to such inspections.

(b) New Castle County Code creates no right to building inspections.

Plaintiffs' second contention is that even if Delaware law creates no property right to building inspections, New Castle County law,[11] standing alone, creates property interests in such inspections.

Even if the Court assumes, arguendo, that the County Code creates a duty to inspect, and that the county officers were guilty of nonfeasance or misfeasance for their failure to

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[11] The County Code provisions upon which plaintiffs rely are cited in footnote 8, supra. There they argued that the state law incorporated the County Code and granted the rights to inspections required by the County Code. Here they argue that county law alone grants the right.

inspect properly, the Court nevertheless is led to the conclusion that the duties created by the Code, like the duty to provide police or fire protection, are owed to the public in general and not to any given individual. Shortino v. Wheeler, 531 F.2d 938, 939 (C.A.8, 1976); Reedy v. Mullins, 456 F.Supp. 955, 958 (W.D.Va.1978); Reiff v. City of Philadelphia, 471 F.Supp. 1262 (E.D.Pa.1979). The Court reaches this conclusion by considering (1) the stated purposes of the Building Code, (2) other Code provisions, (3) the nature of the Code and (4) the types of interest that are actually protected by enforcement of the Code.[12]

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[12] In determining the intent of the County Code the Court adopts the following rule of statutory construction.

> Intent is to be ascertained from the language used, if it is plain and unambiguous; or, if it is not, by considering the legislation in the light of all of its provisions, the object which seeks to accomplish, the pre-existing legislation upon the same subject matter, and all other relevant circumstances.

McAdams v. Barbieri, 143 Conn. 405, 123 A.2d 182, 187 (1956).

Section 100.4 of the Building Code for New Castle County (1975) states that the "express intent" of the Code is:

> to insure public safety, health and welfare insofar as they are affected by building construction, through structural strength, adequate egress facilities, sanitary equipment, light and ventilation and fire safety; and, in general, to secure safety to life and property from all hazards incident to the design, erection, repair, removal, demolition or use and occupancy of buildings, structures or premises.

No reference is made to individuals, citizens or residents as was made in the Ohio law in Goss v. Lopez, supra. The protection afforded is only to the general public. Indeed, another provision of the Code seeks to avoid any possible use of the Code to create individual interests in the duties established. Section 107.8 of the Building Code specifically relieves any "building official, officer or employee charged with enforcement of this code . . . from liability for acts performed under any of its provisions or by reason of any act or omission in the

performance of his official duties in connection therewith," as long as the official was acting in good faith and without malice. While that provision indicates an intent on the part of the framers to have the Code create some enforceable duties owed to the public at large, it also unambiguously reveals their intent not to create any individual liability interest in those duties. In order to find an intention that the provision created individual property interests, the Court would have to find that in the same breath in which the County Council created an entitlement it took away the individual's right to redress the deprivation. It cannot be presumed that a legislative body would do a futile thing. 2A Sutherland, Statutory Construction § 45.12, p. 37 (4th ed. 1973). Hence, a court should avoid an interpretation of a statute "that would deny a remedy while recognizing a right." Board of Retirement of Kern County Employees'

Retirement Ass'n v. Terry, 40 Cal. App.3d 1091, 115 Cal. Rptr. 718 (1974). To interpret the New Castle Code as creating a personal right to building inspections would have exactly that result.

Moreover, it seems unlikely that a technical document, such as the BOCA Building Code, which is designed to be adopted by a large variety of municipalities, would contain any provisions granting personal rights to the practices and procedures that is prescribes. The sections governing procedures, the sections upon which the plaintiffs rely, merely outline the means by which the county can ensure compliance with the Code and do not grant personal rights. Indeed, before the Court would be willing to find a grant of personal rights, it would require a clear statement from the legislative body adopting this 500 page tome that it intended to create such personal rights.

Finally, the Code seeks neither to protect the plaintiffs personally nor to serve

the interests which they asert in this case. The ordinance does not seek to protect individual "homeowners," "residents," or even the purchasers of homes. The Code does not apply to all housing. Inspections are required for new buildings only. If the Code sought to revise the rule of caveat emptor and protect all purchasers of homes, inspections would be required for every transfer. If it sought to protect residents and homeowners, it would seek to regulate already existing structures. The Code requires only that such structures not be unsafe, unsanitary or fire hazards. Building Code § 124.0 (1975). In sum, the Code protects only the public in general, seeking a gradual increase in the quality of housing by mandating good building practices and procedures for any new construction.

Since the Court finds that the County Code creates no duties owed to the plaintiffs as individuals, it holds that the Code creates no Fourteenth Amendment property interests in them.

2. The County Defendants' Commission Of A Tort Is Not A Fourteenth Amendment Deprivation Of Property.

Plaintiffs' next contention is that the county's negligent inspections have tortiously caused them to pay more for their homes than they were worth and to incur additional expenses both in attempts to correct the defects and in meeting extraordinary operating expenses.[13] The plaintiffs contend that a wrong which is recognized and remedied by state tort law is a deprivation of property under the Fourteenth Amendment.

Assuming that a tort may have been committed, the Court is still compelled to find that no injury cognizable under § 1983 and the Fourteenth Amendment occurred. The Supreme Court in two instances, Paul v. Davis, 424 U.S. 693 (1976) and Screws v. United

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[13] Plaintiffs allege that the county defendants caused a deprivation of their property by inducing them to rely, to their detriment, on both the county defendants' negligent inspection and their false certification that the homes complied with the Building Code.

States, 325 U.S. 91 (1945), has held that the commission by a state official of a tort is not, by itself, a deprivation of a right cognizable under § 1983 or the Fourteenth Amendment. Here, as in Paul v. Davis, supra, plaintiffs must pursue their tort claims in state court.

3. Plaintiffs Must Show That The Actions Of A Private Party Depriving Them Of Property Are Attributable To The State In Order to Establish A Violation Of The Due Process Clause.

The Plaintiffs' final contentions is that when the county defendants issued the CO's and thus permitted title to pass on the plaintiffs' homes,[14] they made possible

[14]Building Code § 120.1 prohibits the passing of title "to any new residential building or to the premises on which such new building is erected . . . for the purpose of the first residential occupancy thereof until the certificate of use and occupancy thereof shall have been issued." Thus, plaintiffs argue, by issuing a CO, the county permitted the offending sale and consequent loss of property. Plaintiffs contend that this permission is the same as authorization and causation.
(continued)

Mr. Real Estate Co.'s fraudulent sale and breach of contract and hence "caused" the plaintiff to be deprived of property without due process. Thus, the issue presented is whether, by creating a situation which would permit a private party to deprive another of property, the state is itself either depriving the second party of property or causing the first party to deprive the second of property.

(Footnote 14 continued):

The Court notes, at this point, that the plaintiffs allege that the county defendants also "caused" the deprivation by inducing reliance on their certification both that the buildings had been inspected and that they complied with the Code. This causation by negligence was dealt with separately in the previous section of this opinion. That section dealt with causation by negligence and this section deals with causation by permission. The plaintiffs do not allege that the county defendants intend to cause Mr. Real Estate Co. to deprive them of property. The Court does not reach the issue of whether a state's action, undertaken with the intention of having one private party deprive another of property, would be an action violative of the due process clause.

The Court concludes that it is not.[15]

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[15]This question has, apparently, arisen on at least two occasions in the past. In both cases, local landowners claimed that local officials had deprived them of property without due process when the officials' lax enforcement or non-enforcement of zoning ordinances allowed other private individuals to damage the plaintiffs' property. Although the Court in Beaver v. Borough of Johnsonburg, 375 F.Supp. 326 (W.D.Pa.1974) held such allegations to establish a violation of the Fourteenth Amendment due process clause, this Court will adhere to the contrary holding in Sun Enterprises, Ltd. v. Train, 394 F.Supp. 211, 222 (S.D.N.Y.1975), aff'd, 532 F.2d 280 (C.A.2, 1976).

> As with the state defendants, plaintiffs' allegations against the town defendants are insufficient to establish federal jurisdiction. The damage allegedly being wrought upon the plaintiffs stems from the activities of the private defendants. Such injuries to plaintiffs are not authorized by the permits issued by the town defendants; and although the private defendants may in a sense be encouraged in their alleged transgressions by lackluster enforcement of the law by the town defendants, the actions of the town defendants as alleged in the complaint are not such as would raise a substantial question of deprivation or confiscation of property under the Fifth and Fourteenth Amendments.

394 F.Supp. at 222.

The only losses of property alleged in the plaintiffs' complaints were the direct result of the fraudulent sale of property by the private party, Mr. Real Estate Co. There are no allegations that the county defendants either intended that these sales take place, or that they encouraged or participated in the actions of Mr. Real Estate Co. Instead, by issuing CO's, the county defendants merely permitted a situation which allowed the fraudulent sale to take place. The Court finds, as a matter of law, that the allegations of the plaintiffs do not, for purposes of the due process clause, establish that the county defendants have "caused" a deprivation of property.[16]

Indeed, to hold otherwise would make

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[16]The Court is guided in this decision not by plaintiffs' purely conclusory allegations that the county defendants have caused them to be deprived of property but by its own examinations of the facts alleged in the complaint.

every private deprivation of property which the State chose not to prohibit, by statute or by permit, into a deprivation of property by the State. This would cast state and local governments into the role of insurers against the very types of deprivations that they have chosen not to prohibit. This is not the intent of the Fourteenth Amendment.

Similar considerations have, in cases similar to the present one, led the Supreme Court to conclude that private individuals could not be held liable under § 1983 and the Fourteenth Amendment because their actions lacked the attributes of "state action." The Court has repeatedly held that where the State has neither actively encouraged some private activity nor actively involved itself with the activity, the State's refusal to prohibit the activity, whether embodied in the form of a statute or a permit, will not turn that private activity into the action of the State. Flagg Bros., Inc. v.

Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The crux of the Court's determination, in these cases, of no state action, has been its finding that the state is in no way "responsible" for the private action and that the action is not "attributable" to the state. Flagg Bros., Inc. v. Brooks, supra. The fears of the Court, as expressed in Flagg Bros. are equally applicable to the case at hand:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owners.

Id. at 165.

For the foregoing reasons the Court holds that the county defendants have violated none of the plaintiffs' constitutional rights and will grant the county defendants'

motion to dismiss the complaint against them for failure to state a valid cause of action.

III. THE BANK'S 12(b)(1) MOTION

The Court must still dispose of the Bank's motion to dismiss the complaint for lack of subject matter jurisdiction. The Bank and Mr. Real Estate Co. were added to this action as pendent parties and no independent basis of Federal jurisdiction has been alleged. For the purpose of acting on this motion, the Court will assume, arguendo, that a Federal Court has the discretionary power to exercise pendent party jurisdiction.[17]

[17] The Supreme Court's decision in Aldinger v. Howard, 427 U.S. 1 (1976) left the status of pendent party jurisdiction unclear. That case involved the attempt to add a party which, under the law at that time, had been specifically excluded from the application of the statute under which subject matter jurisdiction was asserted. The language of the Court leaves open the question of whether a party that had not been specifically given immunity from the jurisdiction (continued)

Nevertheless, in the present case, the Court concludes that it should decline to exercise that power. It is guided to this conclusion by the express example given by the Supreme Court in United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) of those situations where pendent jurisdiction ought not to be exercised. There the Court stated:

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Given this unambiguous directive, the Court will dismiss the plaintiff's state claims against the Bank and Mr. Real Estate Co. for lack of subject matter jurisdiction.

An Order will be entered in accordance with this Opinion.

(Footnote 17 continued):
of the federal courts under the statute granting jurisdiction over the principle cause of action could be added as a pendent party on a claim founded purely upon state law.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROSEMARIE C. WOOTERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No.
	)	
MARY D. JORNLIN, et al.,	)	78-404
	)	
Defendants.	)	

O R D E R

LATCHUM, Chief Judge.

For the reasons stated in the Court's Opinion entered in this case on this date, it is

ORDERED that the complaint be and is hereby dismissed with respect to all defendants.

Dated: September 20, 1979.

/s/ James L. Latchum
Chief Judge

U.S. CONSTITUTION

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therof to the de-

privation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

DELAWARE CODE

9 Del. C. §1361. Functions.

The department of Development and Licensing, headed by a Director of Development and Licensing, shall perform the following functions:

(1) The Department, except as otherwise specifically provided in this title, shall administer and enforce all statutes, ordinances, and regulations for the protection of persons and property from hazards, in the use, occupancy, condition, erection, alteration, maintenance, repair, sanitation (including the maintenance and condition of plumbing and drainage facilities and the maintenance of sanitary conditions in housing accommodation), removal

and demoliton of buildings and structures or any parts thereof, and the grounds appurtenant thereto, in the operation of equipment therein, and of outdoor signs. The Department shall enforce compliance with the Zoning Code and regulations thereunder, subject to determinations made by the Board of Adjustment on appeals taken to it.

(2) The Department shall (i) issue all forms for applications and receive all applications for any license; (ii) determine whether the applicant is properly entitled to the license which he seeks; (iii) if the application is granted and the proper fee has been paid to the Department of Finance, issue the license to the applicant, either for itself or as agent for the officer, department, or board under whose jurisdiction the subject matter thereof falls; (iv) if the application is refused, notify the applicant in writing of the refusal and the

reasons therefor. The requirements and standards to be met by applicants for licenses shall include those established by law. They shall also include those established by the Department in cases in which the Department is responsible for the functions involved, or if some other office. department or board be responsible for the function, the requirements and standards shall be certified to the Department by the officers, departments and boards for which the Department is acting.

(3) The Department shall make all inspections except as otherwise specifically provided in this title.

(4) The Department shall determine, as the result of its inspection, whether any person or the owner of any property is violating the conditions of any license, or whether or not any property owner is violating any statute, ordinance or regulation which it is the duty of the Department to enforce. If the Department

shall find a violation to exist, it shall forthwith make such order or take such other lawful action as may be necessary to correct the dangerous or unlawful condition, and if necessary it shall invoke the assistance of the County Attorney or the Department of Police, or both.

(5) The Department, whenever it finds that a holder of any license is violating the conditions thereof, and whenever the officer, department, or board as whose agent the Department granted the license directs the Department to do so, shall revoke, suspend or cancel the license. Any revocation, suspension or cancellation shall be in writing and shall state in detail the reasons therefor.

(6) The Department, on request of any officer, department or board, shall make a special inspection of any property upon which unlawful conditions are believed to exist or of the manner in which the holder of any license is operating under it.

The Department shall receive and consider complaints from citizens.

(7) The Department, in cooperation with the Department of Planning, shall undertake studies of housing accommodations, devise and recommend means of improving housing conditions, and undertake programs for housing betterment.

(8) The Department shall undertake and execute, or supervise the execution of, all programs of redevelopment, low rent housing, and urban renewal.

(9) The Department, incooperation with the Department of Planning, shall undertake studies of the pattern and of the potential for economic development within the County, and recommend to the County Executive, programs designed to improve basic conditions conducive to better economic development of the County.

9 Del. C. § 1362. Definitions.

In this subchapter:

(1) "License" shall mean any license or

permit required by statute, ordinance or regulation to be obtained from any county officer, department, or board as a prerequisite to engaging in any activity or having possession of or using any property but shall not include the right of admission to any facility in any park under the jurisdiction of the Department of Parks and Recreation.

(2) "Inspection" shall mean any inspection, test or examination to which any person is subject as an applicant for, or a holder of, a license, or to which any property is subject under any statute, ordinance or regulation which it is the duty of the County Executive or of any other officer, department or board to enforce.

9 Del. C. §1363. Board of License Inspection and Review.

The county government, by ordinance, may provide for the establishment of a Board of License Inspection and Review of 5

members to be appointed by the County Executive, 4 members for terms of 4 years provided that the terms of the original members shall be established in a manner that 1 shall expire each year, and 1 member to be chairman and to serve at the pleasure of the County Executive. The ordinance shall provide that the Board may be authorized to provide an appeal procedure whereby any person aggrieved by the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of any county inspection affecting him directly shall, upon request, be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the Board. The ordinance shall further provide that upon such hearing the Board shall hear any evidence which the aggrieved party or the County may desire to offer, shall make findings and render a decision in writing within 90 days of the filing of the appeal, and

that the Board may affirm, modify, reverse, vacate or revoke the action from which the appeal was taken to it.

16 Del. C. §8303. Building Inspector--Appointment; compensation; duties.

The County Council of New Castle County shall appoint a Building Inspector who shall serve for a term as fixed by the County Council at a salary to be fixed by the County Council with an additional contingent expense fund to be fixed by the County Council. The Building Inspector shall be under the jurisdiction of the office of the County Engineer.

16 Del. C. §8306. Same -- Powers and duties.

(a) The Building Inspector shall enforce all laws, rules and regulations adopted by the County Coucil of New Castle County relating to the location construction, alteration, repair, removal, demolition, equipment, use and occupancy and maintenance of buildings and structures except as otherwise provided for.

(b) He shall receive all applications required by the building Code as adopted by the County Council of New Castle County and issue permits and shall furnish the prescribed certificates.

(c) He shall make or cause to be made the necessary inspections to see that the provisions of law are complied with and the construction is prosecuted safely.

(d) He may order and compel the suspension of any work and prohibit the use of any material or equipment in violation of the provisions of the Building Code and make or cause to be made such tests as he deems necessary to determine the safety of a building or structure, material or equipment which it is his duty to inspect.

(e) For the purpose of enforcing compliance with law to remove illegal or unsafe conditions, to secure the necessary safeguards during construction or to require adequate exit facilities in ex-

isting building he shall issue such notices or orders as may be necessary.

16 Del. C. §8307. Inspections.

Inspections required under the provisions, rules and regulations adopted by the County Council of New Castle County shall be made by the Building Inspector or by 1 of the assistant building inspectors or helpers. In the case of the inspection of elevators of casualty companies or electric wiring, they may accept reports of inspectors of casualty companies or of other recognized inspection services after investigation of their qualifications and reliability. No certificate called for by a provision of the Building Code shall be based on such reports unless the same are in writing and certified over the signature of the person making the inspection and report that the provisions of the Building Code are complied with and that there are no unsafe conditions.

16 Del. C. §8308. Records.

(a) The Building Inspector shall keep a careful and comprehensive record of applications, or permits issued, of certificates issued, of inspections made, of reports rendered and of notices or orders issued. He shall retain on file copies of all papers in connection with building work so long as any part of the building or structure to which they relate may be in existance, except that construction plans for buildings or structures of less than $100,000 value need not be retained after work shown on such plans has been completed and has been approved and accepted. He shall keep a record of all violations of any rules or regulations promulgated by the County Council of New Castle County, with the name of the owner or builder and the location where such violations are found.

(b) All records shall be open to public inspection at the discretion of the Inspector, but shall not be removed from the

office of the Building Inspector.

16 Del. C. §8314. Use and maintenance of building erected in violation of code.

(a) No person shall maintain, occupy or use a building or structure or part thereof that has been erected or altered in violation of this chapter or of any of the rules, regulations or orders adopted by the County Council of New Castle County pursuant to the purpose of this chapter.

(b) A person who has erected or is maintaining such a building or structure shall remove the building or structure or cause the same to be removed. If such person fails to do do, the Building Inspector with the approval of the County Council of New Castle County, may remove such unlawful building or structure or cause the same to be altered to comply with the law and whatever expense shall be incurred in relation thereto shall be paid by the County Treasurer out of the moneys in the Treasury, and the owner or owners shall be

jointly and severally liable to the County Council of New Castle County for the full amount so expended. The County Council of New Castle County may maintain an action at law against such owner or owners to recover the sums of moneys so expended, plus lawful interest and costs.

16 Del. C. §8315. Penalties.

The owner of a building, structure or premises where anything in violation of this chapter or the rules or requirements as promulgated by the County Council of New Castle County shall be placed and any architect, builder, contractor, agent, person or corporation employed in connection therewith and who has participated or assisted in the connection of such violation shall each be fined not more than $200 for each offense and the further sum of $10 for each and every day such violation continues.

16 Del. C. §8317. Exceptions.

This chapter shall not apply to structures necessary to the operation of farm

lands nor to properties located within any incorporated city or town in New Castle County, nor to individual owners of properties who desire to do their own work as contemplated by this chapter in and about their own homes occupied by such owners and which are not for sale.

NEW CASTLE COUNTY (NCC) CODE

NCC Code § 2-44

Any person aggrived by the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of any county license, or by any notice, order or other action as a result of any county inspection affecting him directly shall, upon request and within ten (10) days thereof, be furnished with a written statement of the reasons for the action taken. Within twenty (20) days of the action taken, the person aggrieved may file an appeal with the board of license inspection and review and shall be afforded a hearing thereon, Upon such

hearing, the board shall receive any evidence which the person aggrieved or the county may desire to offer, shall make findings and shall render a decision in writing within ninety (90) days of the filing of the appeal. The board may affirm, modify, reverse, vacate or revoke the action appealed; provided, that such action shall be affirmed by the board if the action was not arbitrary or capricious and was taken pursuant to law; and provided further, that the decision of the board shall not vary the terms of any law, code or ordinance. NCC Code §2-66.

The department of public works shall perform all the functions and duties prescribed by 9 Delaware Code, Section 1421 and shall also perform all functions and duties prescribed by 9 Delaware Code, Section 1361 or by any county ordinance to the department of development and licensing.

NCC Building Code §111.5

Upon completion of the building or structure, and before issuance of the certificate of use and occupancy required in Section 120.0, a final inspection shall be made and all violations of the approved plans and permit shall be noted and the holder of the permit shall be notified of the discrepancies.

NCC Building Code §120.1

New Buildings. No building hereafter erected shall be used or occupied in whole or in part until the certificate of use and occupancy thereof shall have been issued by the building official. Title to any new residential building or to the premises on which such new building is erected shall not be transferred for the purpose of the first residential occupancy thereof until the certificate of use and occupancy thereof shall have been issued by the building official.

When a building or structure is entitled thereto, the building official shall issue a certificate of use and occupancy within ten (10) days after written applications. The certificate shall certify compliance with the provisions of this code and the purpose for which the building or structure may be used in its several parts. The certificate of use and occupancy shall specify: the use group, in accordance with the provision of Article 2; the fire grading as defined in Article 2 and Table 902; the maximum live load on all floors as prescribed in Article 7; the occupancy load in the building and all parts thereof as defined in Article 2 and Article 6; and any special stipulations and conditions of the building permit.

AMENDED COMPLAINT

COUNT I

1. The plaintiffs are:

(a) Rosemarie C. Wooters, Glenn Wooters, Patricia Johnson, Donald Johnson, Cynthia Loveless, and Harry Loveless, all residents of and homeowners of Brookmont Farms ("Brookmont Farms"), a residential development located in New Castle County, State of Delaware;

(b) Pursuant to Fed. R. Civ. P. 23(a) and 23 (b)(2), all other residents of and homeowners in Brookmont Farms. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of the named plaintiffs are typical of the claims of the class and those plaintiffs will fairly and adequately protect the interest of the class. In addition, defendants have acted and refused to act on grounds generally appli-

cable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. The class consists of approximately 544 homeowners in Brookmont Farms.

2. The defendants are:

(a) Mary D. Jornlin ("Jornlin"), who is the present elected County Executive of New Castle County and a resident of the State of Delaware;

(b) Henry J. Folsom, Jr. ("Folsom"), who was acting County Executive of New Castle County prior to Jornlin's election, and is a resident of the State of Delaware;

(c) Melvin Slawik ("Slawik"), who was Jornlin's predecessor as elected County Executive of New Castle County, and is a resident of the State of Delaware;

(d) Albert W. Madora ("Madora"), who was, at all times relevant to this Complaint, Director of the New Castle County Department of Public Works, and is a resident of the State of Delaware;

(e) Stephen Kowalchuk, Jr., ("Kowalchuk"), who is the present Director of Development and Licensing of the New Castle County Department of Public Works, and a resident of the State of Delaware;

(f) Warren O'Sullivan ("O'Sullivan"), who was Acting Director of Development and Licensing of the New Castle County Department of Public Works prior to Kowalchuk's appointment, and is a resident of the State of Delaware;

(g) Edward F. Peterson ("Peterson"), who was Kowalchuk's predecessor as Director of Development and Licensing of the New Castle County Department of Public Works, and is a resident of the State of Delaware;

(h) Thomas Fede ("Fede"), who was, at all times relevant to this Complaint, Chief Building Inspector of the New Castle County Department of Public Works, and is a resident of the State of Delaware;

(i) James Cunane ("Cunane"), John Dugan ("Dugan"), Robert Roberto ("Roberto") and Clifford Turner ("Turner"), who were, at all times relevant to this Complaint, building inspectors for the New Castle County Department of Public Works, and are residents of the State of Delaware;

(j) New Castle County, a political subdivision of the State of Delaware;

(k) David Biloon ("Biloon"), who is the present Director of Lines and Grades of the New Castle County Department of Public Works, and a resident of the State of Delaware;

(l) Maryland National Bank, ("Bank"), a National bank chartered in the State of Maryland, which financed both the building of Brookmont Farms through a construction loan, and the purchasing of many individual homes through mortgage loans; and

(m) Mr. Real Estate Co., a Delaware corporation, the developer and builder of the homes in Brookmont Farms ("Builder").

3. This action is brought under 42 U.S.C. §1983 (1976) and this Court has jurisdiction over it pursuant to 28 U.S.C. §1343(3) and (4) (1976), and principles of pendant jurisdiction.

4. Brookmont Farms was planned, constructed, and offered for sale to the public as a new moderate and low income housing development, consisting of single-family homes.

5. Pursuant to state law, defendants Fede, Cunane, Dugan, Roberto and Turner had a duty to inspect (as defined by 9 Del. C. §1362(a) all new housing in New Castle County to determine compliance with applicable law, before a Certificate of Occupancy ("CO") could be issued permitting the housing to be occupied for habitation.

6. Pursuant to state law, defendant Biloon and his predecessors had a duty to determine the lines and grades of all property upon which construction was contemplated.

7. Pursuant to state law, defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk, O'Sullivan and Peterson had a duty to ensure that defendants Fede, Cunane, Dugan, Roberto, Turner and Biloon properly accomplished their statutory tasks.

8. Prior to plaintiffs' settlement and occupancy of their homes, the defendants named in paragraphs 5,6 and 7 ("the County defendants") issued or permitted to be issued CO's for those homes, thereby certifying that they were constructed in accordance with all applicable law.

9. Relying upon the issuance of the CO's, plaintiffs settled on and moved into their homes, only subsequently to discover numerous non-conformities with the building code and applicable laws, including, but not limited to, the following defects in construction:

(a) Cracks in house walls, foundations and patios;

(b) Defective siding on home exter-

iors;

(c) Improperly functioning air conditioning and heating systems;

(d) Inadequate roof rafters, causing roofs to sag;

(e) Unsafe electrical wiring;

(f) Faulty plumbing, resulting in leaks to the interior of the houses;

(g) Sinking floors as a result of building the homes in an area with a high water table;

(h) Improper grading and drainage.

10. As these defects were inherently unknowable, plaintiffs were blamelessly ignorant of the non-comformities at the time they moved into their homes.

11. In the light of the numerous non-comformities with applicable law, CO's and other licenses (defined in 9 Del. C. § 1362(1) for the homes in Brookmont Farms should not have been issued or permitted to be issued by the County defendants.

12. Had the County defendants complied

with their statutory duties and revoked or refused to issue CO's and other licenses to the Builder, plaintiffs would have been made aware of the defective construction and would then have been able to cancel their contracts to purchase the houses and/or institute legal proceedings against the Builder, thereby minimizing their damages.

13. As a consequence of the County defendants' failure to revoke or refuse to issue CO's and other licenses in Brookmont Farms, plaintiffs no longer have a sufficient remedy against the Builder, which is without assets sufficient to satisfy plaintiffs' claims.

14. The County defendants were negligent, reckless, wilful and wanton, in a manner proximately causing injury to the plaintiffs, in that:

(a) Defendants Fede, Cunane, Dugan, Roberto and Turner either failed to perform the necessary, and state mandated inspections at all, or else conducted

them without using the proper standard of care, which resulted in the improper issuance of the CO's and other Licenses;

(b) Defendant Biloon and his predecessors either failed to perform the necessary determination of lines and grades or else determined them without using the proper standard of care, which resulted in the improper issuance of licenses;

(c) Defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk, O'Sullivan and Peterson failed properly to supervise the activities of Fede, Cunane, Dugan, Roberto, Turner, Biloon and others, so as to ensure that the statutory standards were met;

(d) As policy-makers for New Castle County, defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk, O'Sullivan and Peterson knowlingly permitted the custom and practice of non-existent or inadequate inspection of new housing for compliance with applicable law and otherwise accepted, tolerated and condoned this practice.

15. As a direct result of the County defendants' conduct, the homes purchased by plaintiffs were not in the statutorily mandated physical condition as represented by the CO's, and consequently the actual value of the home was only a small fraction of the amount plaintiffs paid for them.

16. As a further direct result of the County defendants' conduct, plaintiffs have been forced to expend sums of money; (a) in unsuccessful attempts to cure the construction defects in their homes; and (b) in meeting extraordinary operating expenses, including, but not limited to, excessive insurance premiums for minimal coverage and excessive heating and cooling costs.

17. As a further direct result of the County defendants' conduct, plaintiffs have been prevented from having normal use and enjoyment of their homes, have suffered and will continue to suffer distress, annoyance, inconvenience and embarrassment because of the defective condition of their homes.

18. The County defendants so wilfully and wantonly violated their statutory duties resulting in injury to plaintiffs that those defendants' conduct justifies the imposition of punitive damages.

19. The County defendants' actions constitute a violation of plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 (1976), because those actions have deprived plaintiffs of their property rights without due process of law.

20. The County defendants' actions were carried out in accordance with a custom and practice of defendant New Castle County, and therefore the County itself is liable for all losses that plaintiffs have suffered, under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 (1976).

COUNT II

21. Paragraph 1-4 are realleged and

incorporated by reference.

22. The Bank sent commitment letters to plaintiffs in which it represented that the plans and specifications of the model home of Brookmont Farms had been approved by the Bank, that the homes in Brookmont Farms financed by mortgage loans from the Bank would conform to the model except for extra items purchased by each individual plaintiff, and that the mortgage loan funds would not be disbursed until construction had been completed to the satisfaction of the Bank.

23. Plaintiffs relied on these representations by the Bank to ensure that their homes would be constructed in accordance with the plans and specifications approved by the Bank.

24. Contrary to the Banks's representations, plaintiffs' finished homes had numerous non-comformities with the plans and specifications, including, but not limited to, the following:

(a)-(h) of Paragraph 9 are realleged and incorporated by reference.

25. Had the Bank followed its representations and refused to disburse the loan funds until the construction complied with the approved plans and specifications, plaintiffs would have been made aware of the defective construction and would then have been able to cancel their contracts to purchase the houses and/or institute legal proceedings against the Builder, thereby minimizing their damages.

26. As a consequence of the Bank's failure to follow its representations, plaintiffs no longer have a sufficient remedy against the Builder, who is without sufficient assets to satisfy plaintiffs' claims.

27. As a direct result of the Bank's conduct, the actual value of the homes was only a small fraction of the amount plaintiffs paid for them.

28. As a further direct result of the

Bank's conduct plaintiffs have been forced to expend sums of money; (a) in unsuccessful attempts to cure the construction defects of their homes and (b) in meeting extraordinary operating expenses, including, but not limited to, excessive insurance premiums for minimal coverage and excessive heating and cooling costs.

29. As a further direct result of the Bank's conduct, plaintiffs have been prevented from having the normal use and enjoyment of their homes, and have suffered and will continue to suffer, distress, annoyance, inconvenience and embarrassment because of the defective condition of their homes.

30. As the allegations in this Count arise out of the same common nucleus of facts as the allegations in Count I, this Court has jurisdiction of this Count through principles of pendant jurisdiction.

COUNT III

31. Paragraphs 1-4 are realleged and

incorporated by reference.

32. The Builder contracted with plaintiffs to construct the homes in Brookmont Farms in substantial accordance with plans and specifications agreed to by both plaintiffs and the Builder.

33. The Builder breached its contracts with plaintiffs by failing to construct their homes in accordance with those plans and specifications, resulting in defects in the construction which include, but are not limited to, the following:

(a)-(h) of Paragraph 9 are realleged and incorporated by reference.

34. Plaintiffs have been damaged by the Builder's breaches of contract in an amount which represents the cost of correcting these defects so as to bring the construction into compliance with contractual plans and specifications.

35. Plaintiffs have also been damaged by the Builder's breaches of contract in the amounts that they have been forced

to expend in unsuccessful attempts to cure the construction defects in their homes.

36. As the allegations in this Count arise out of the same common nucleus of facts as the allegations to Count I, this Court has jurisdiction over the allegations in this Count through principles of pendant jurisdiction.

WHEREFORE, plaintiffs respectfully request that:

A. This suit be certified as a class action pursuant to Fed. R. Civ. P. 23(c).

B. This Court enjoin the County defendants from continuing their practice of failing properly to inspect new construction prior to issuance of the Certificates of Occupancy, and

C. This Court enjoin the Bank from any further foreclosures on mortgages of homes in Brookmont Farms, for the pendency of this action.

D. This Court award to plaintiffs compensatory and punitive damages in sums

justified by the evidence, interest as appropriate, all costs, and attorneys' fees pursuant to 42 U.S.C. § 1988 (1976).

ELWYN EVANS, JR.
Suite 800, Market Tower
Wilmington, Delaware 19801
Attorney for Plaintiffs

OF COUNSEL:

Morris, Nichols, Arsht & Tunnell
American International Building
Twelfth and Market Streets
Wilmington, Delaware 19801

Supreme Court, U. S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

NO. 80-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROSEMARIE C. WOOTERS, ET AL.,

PETITIONERS,

V.

MARY D. JORNLIN, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOWARD M. BERG
One Customs House Sq.
Customs House Plaza
Wilmington, DE 19801
(302) 571-8600
Attorney for
Respondents

QUESTIONS PRESENTED

I. WERE PETITIONERS DEPRIVED OF ANY PROPERTY INTEREST?

II. WERE PETITIONERS DENIED DUE PROCESS BY THE DEFENDANTS?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	11
ARGUMENT	12
CONCLUSION	27
APPENDIX	

TABLE OF AUTHORITIES

	PAGE
Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 Supr. Ct. 2701, 33 L. Ed. 2d 548 (1972)	14,15,26
E. I. duPont de Nemours & Co. v. Clark Del. Supr., 88 A.2d 436 (1952)	16,24
Goss v. Lopez 419 U.S. 565, 95 Supr. Ct. 729, 42 L. Ed. 2d 725 (1975)	13
Leis v. Flynt 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979)	12,23
Lindsey v. Norment 405 U.S. 56, 92 Supr. Ct. 862, 31 L. Ed. 2d 36 (1972)	13
Mathews v. Eldridge 424 U.S. 319,335, 96 Supr. Ct. 893,903, 47 L. Ed. 2d 18,33 (1976)	22
Paul v. Davis 424 U.S. 693, 96 Supr. Ct. 1155, 47 L. Ed. 2d 405 (1976)	26

OTHER AUTHORITIES

Rule 12(b)(1) and (6), F.R.Civ.P.	9
42 U.S.C. §1983	9,10,12, 20,26
56 Del. Laws, Ch. 408	16

	PAGE
9 Del. C. Part II, Ch. 13	13,14
9 Del. C. §1361	14,16
16 Del. C. §7601	17
16 Del. C. Ch. 83	13,14,16, 17
16 Del. C. §8329	16,17
New Castle County Code §2-44	14,17,18, 19
New Castle County Code §2-66	14
New Castle County Code §5-1	14
New Castle County Code §5-2 (h.1)	18

CONSTITUTIONAL AND STATUTORY PROVISIONS

These provisions are set forth verbatim in the Appendix:

Delaware Laws

56 Del. Laws, Ch. 408

New Castle County (NCC) Code

NCC Code §5-1

NCC Code §5-2(n.1) 112.3

STATEMENT OF THE CASE

The plaintiffs are residents of and homeowners of Brookmont Farms, a residential development in New Castle County, Delaware. Defendants, Mary D. Jornlin, Henry J. Folsom, Jr., and Melvin Slawik, have in sequence held the post of County Executive of New Castle County. Defendant Albert W. Madora is the Director of the New Castle County Department of Public Works; defendants Stephen Kowalchuk, Jr., Warren O'Sullivan, and Edward F. Peterson, have sequentially held the post of Director of Development and Licensing of New Castle County Department of Public Works; Thomas Fede is the Chief Building Inspector of New Castle County Department of Public Works and James Cunane, John Dugan, Robert Roberto, and Clifford Turner are Building Inspectors for the New Castle County Department of Public Works; David Biloon is the Director of

Lines and Grades for the New Castle County Department of Public Works.

Brookmont Farms was planned, constructed and offered for sale as new, moderate and low income, single family homes. Prior to plaintiffs' settlements on their homes in Brookmont Farms, the County defendants issued or permitted to be issued certificates of occupancy for each home. Plaintiffs relied upon such certificates of occupancy to indicate that the homes were constructed in compliance with applicable law, but after moving in found numerous nonconformities with the building code. These defects were unknowable. Plaintiffs state that if they had been aware of the defects they would have canceled their Agreements of Sale or taken other action against the builder. The builder now lacks sufficient assets to satisfy the plaintiffs' claims.

The defendants Fede, Cunane, Dugan, Roberto and Turner allegedly either failed to perform the necessary inspections or conducted them without the proper standard of care resulting in the improper issuance of the certificates of occupancy. The defendant Biloon failed to perform the necessary determination of lines or grades, or determined them without using the proper standard of care resulting in the improper issuance of licenses. The defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk, O'Sullivan and Peterson failed to properly supervise the other individual defendants. The defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk and Peterson knowingly permitted the custom and practice of non-existence or inadequate inspections of new housing and accepted, tolerated and condoned this practice.

The homes purchased by the plaintiffs were not in the physical condition

as allegedly represented by the certificates of occupancy and the plaintiffs have expended money unsuccessfully to cure the several construction defects and in meeting extraordinary operating expenses. Additionally, the plaintiffs have suffered less than normal use and enjoyment of their homes and have suffered certain distress, annoyance, inconvenience, and embarrassment because of the defective condition of their homes.

Plaintiffs commenced this action on their own behalf and of all other homeowners of the development seeking damages and injunctive relief under 42 U.S.C. §1983. The County defendants moved to dismiss the Complaint, pursuant to Rule 12(b)(1) and (6), F.R.Civ.P., contending that the Court lacked subject matter jurisdiction and that the Complaint failed to state a claim upon which relief could be granted. The District

Court denied the County defendants' Motion to Dismiss for lack of subject matter jurisdiction but granted the County's Motion to Dismiss for failure to state a claim upon which relief could be granted under 42 U.S.C. §1983, finding that the County defendants violated none of the plaintiffs' Constitutional rights.

As plaintiffs' Complaint was held to fail to state a claim, the facts set forth in their Complaint have been accepted as true and the pleadings considered in the light most favorable to plaintiffs as the non-moving party in this Statement of the Case.

SUMMARY OF ARGUMENT

I. THE STATE STATUTES AND COUNTY ORDINANCES CITED BY PETITIONERS DID NOT CREATE ANY INDIVIDUAL PROPERTY INTERESTS IN PETITIONERS.

II. THE DISTRICT COURT CORRECTLY CONSIDERED THE INTERESTS OF THE PETITIONERS AND THE DEFENDANTS IN DETERMINING NO DENIAL OF DUE PROCESS OCCURRED.

ARGUMENTS

I. THE STATE STATUTES AND COUNTY ORDINANCES CITED BY PETITIONERS DID NOT CREATE ANY INDIVIDUAL PROPERTY INTERESTS IN PETITIONERS.

Plaintiffs' Petition for Writ of Certiorari sets forth that they have been deprived of rights secured to them by the Constitution in violation of 42 U.S.C. §1983. Plaintiffs in their Petition, as they did in the courts below, strive to show precisely the due process which they claim to have been denied but their Petition fails to show that they had a property right which was entitled to due process protection. Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d. 717 (1979).

Plaintiffs do not point to a federal source for the property rights of which they claim they were deprived by the action of the County defendants and indeed it would be difficult for them to do so as this Court has specifically held that

the Constitution does not guarantee access to dwellings of a particular quality. Lindsey v. Norment, 405 U.S. 56, 92 Supr. Ct. 862, 31 L. Ed. 2d 36 (1972).

Plaintiffs claim that certain statutes of Delaware and ordinances of New Castle County give rise to benefits which they have been denied without due process of law. Thus it is necessary to look at those state statutes and rules to determine if the plaintiffs are entitled to the benefits claimed. Goss v. Lopez, 419 U.S. 565, 95 Supr. Ct. 729, 42 L. Ed. 2d 725 (1975).

The state statutes which the plaintiffs point to are 9 Del. C. Part II, Ch. 13 and 16 Del. C. Ch. 83. The first of these deals with the organization of New Castle County government and the second of these statutes deals with county building codes. The court below in its Opinion dealt only with the provisions of Title 9

Del. C. Part II, Ch. 13. This was proper as the officials and their duties described in 16 Del. C. Ch. 83 were absorbed and taken over by the New Castle County Department of Development and Licensing established by 9 Del. C. §1361. [These duties were subsequently transferred from that Department to the Department of Public Works by New Castle County Code §2-66]. The ordinances of New Castle County relied upon by the plaintiffs are those adopting the BOCA Code as the County's Building Code, NCC Code §5-1 and those dealing generally with licensing and licensing appeal, NCC Code §2-44.

The District Court correctly concluded that these statutes as well as these ordinances of New Castle County created no property interest of plaintiffs such that they would have an entitlement to the benefit which they are claiming. See, Board of Regents of State Colleges v. Roth, 408 U.S. 564,

92 Supr. Ct. 2701, 33 L. Ed. 2d 548 (1972).

The benefit which the plaintiffs claim they are entitled to was that the various statutes of Delaware and ordinances of New Castle County cited by them established a system of building permits, inspections, and ultimately a certificate of occupancy for all new residential buildings within the County and that as purchasers of new residential property in the County they were entitled to rely upon such certificates of occupancy as assuring that their respective properties conformed to all the provisions of the New Castle County Building Code, or BOCA Code. Plaintiffs claim that they were deprived of this benefit when the County inspectors by misfeasance or nonfeasance issued certificates of occupancy for their residences when they did not conform to the County Building Code. The District Court ruled and the Court

of Appeals for the Third Circuit agreed that the statutes cited by the plaintiffs failed to establish any entitlement in them to the benefit which they were claiming.

The state statutes asserted by the plaintiffs to be the source of their entitlement to the benefit being claimed clearly fall far short of creating any right in them. Title 9 Del. C. §1361 et seq. is an organizational statute setting forth with some detail the division of duties between the various departments of the New Castle County government which was being reorganized. Title 16 Del. C. Ch. 83 was described by the Delaware Supreme Court as an enabling act, E. I. duPont de Nemours & Co. v. Clark, Del. Supr., 88 A.2d 436 (1952). The status of this statute as an enabling act is clearly borne out by its subsequent amendment by 56 Del. Laws, Ch. 408 which added §8329 expanding the scope of this

enabling act to cover all of New Castle County as well as the remaining two Counties of Delaware. [For reasons not appearing anywhere in the Delaware Code when that Code was revised in 1974, 16 Del. C. §8329 was recodified as 16 Del. C. §7601.] In the Court of Appeals the plaintiffs argued that the Legislature imposed a mandatory duty on the County to enact a building code for rural New Castle County but only a discretionary duty as to the remaining portions of the County and State. However, this argument completely ignored the Delaware Supreme Court's characterization of 16 Del. C. Ch. 83 as enabling legislation.

Plaintiffs have cited the provisions of New Castle County Code §2-44 to build an argument that they were aggrieved by the issuance of the certificates of occupancy and that they would have a right of appeal within ten (10) days of the issuance to appeal if the actions of the

County had not deprived them of notice that they were aggrieved by the issuance.

The weakness of the plaintiffs' argument can readily be seen when reference is made to other provisions of the New Castle County Building Code. New Castle County Code §5-2(h.1) provides in substance that the application for the building permit is to be made by the owner or the owner's designated agent. Thus, a certificate of occupancy is issued by the County not to the persons in the plaintiffs' status but rather to the person in the position of the defendant MR Real Estate Co. Indeed, there is no necessity under the New Castle County Code that the property involved be subject to an agreement of sale at the time of the issuance of the certificate of occupancy. When this fact is considered it is clear that it is merely chance that a particular purchaser would fall within the provisions of New Castle County Code §2-44 at

the time of the issuance of the certificate of occupancy.

The plaintiffs' lack of any entitlement to the benefits which they are claiming from the state statutes and county ordinances is even more pronounced when they attempt to set forth the due process proceedings which they claim has been denied them. Plaintiffs point to New Castle County Code §2-44 and claim that they would have had the right to attack the improper issuance of the certificates of occupancy because they would have been parties aggrieved by them. To reach this point the plaintiffs have to make several assumptions.

First, plaintiffs have to assume that they would have received notice of the issuance within ten (10) days thereof. As noted above, there are no restrictions in the Code as to when the certificates of occupancy could be issued. If a certificate of occupancy is

issued before an agreement of sale is signed then does the eventual purchaser of the property also purchase a right to sue the County under 42 U.S.C. §1983 for a denial of due process which may have occurred before the purchaser even knew of Brookmont Farms?

Second, plaintiffs would have had to have known that the certificates of occupancy were improperly issued before they would have known they were aggrieved parties. The only manner in which they would have known this fact would be by making a thorough inspection of the property or having it thoroughly inspected on their behalf before settlement, or purchase, which is precisely the obligation which they are seeking to shun by placing the duty of such inspections solely upon the County.

There is in reality no procedure by which the entitlement which the plaintiffs

are claiming could be effectively protected since it is a benefit which was never intended to be created by statute or ordinances. As pointed out by the District Court in its Opinion the statutes and ordinances involved speak only of the general welfare; they do not speak of creating any rights in any individuals or property owners or purchasers of property [A-32].

II. THE DISTRICT COURT CORRECTLY CONSIDERED THE INTERESTS OF THE PETITIONERS AND THE DEFENDANTS IN DETERMINING NO DENIAL OF DUE PROCESS OCCURRED.

This Court has set out a three-part test for the determination of cases alleging a denial of due process. There should be a consideration of three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319,335, 96 Supr. Ct. 893,903, 47 L. Ed. 2d 18,33 (1976).

Here, the plaintiffs fall short when consideration of all three factors is made. First, their interest is a misplaced expectation. Rather than protect themselves in the purchase of new residential real estate they absolutely

relied upon the New Castle County government to protect them. As set forth in Part I the benefit being claimed by the plaintiffs cannot be shown to be derived from any statute, legal rule or mutually explicit understanding. Leis v. Flynt, supra.

Second, any deprivation of the plaintiffs' interest is not a result of procedural deficiencies which could be corrected but rather it can be pointed to errors committed by the County officials in the performance of their duties. Even if the County building inspectors had diligently pursued their task, given the time and other limitations imposed upon them, there is still the distinct possibility that violations of the BOCA Code could have existed despite the issuance of a certificate of occupancy. Plaintiffs would be as equally aggrieved by

violations of the BOCA Code resulting from mere negligent oversight as from deliberate misfeasance or nonfeasance as alleged. There are in reality no additional procedural safeguards which could reasonably be constructed to further protect the plaintiffs' interest.

Third, the plaintiffs, in reality, are attempting to construct an argument that the County was a guarantor of their property and that the failure of their property to meet every specification of the BOCA Code amounts to a violation of such guarantee. It is clear from a review of the County's role in this matter that such was not the case. The enabling act authorizing the adoption of a building code was designed to promote the general health and welfare. E. I. duPont de Nemours & Co., supra.

It was intended as a means of raising the general quality of property in the County as well as reducing safety and fire hazards. It is clear from the enabling statute as well as the enacting ordinances that the County was not intended to become a guarantor of new property. The District Court properly looked at the burden which would have been imposed upon the County to undertake such a role both in terms of manpower and commitment of its financial resources and rejected plaintiffs' assertion that such a result was intended by either the Delaware Legislature or County Council.

While plaintiffs allege great financial loss because of the deficiencies in the inspections leading to the certificates of occupancy this Court does not look to the weight of the plaintiffs' concern but rather to the nature of the

plaintiffs' concern to determine initially if they are entitled to Constitutional protection. Board of Regents of State Colleges v. Roth, supra.

When the plaintiffs' Complaint is stripped of its civil rights terminology it is obvious the plaintiffs have done nothing more than allege a tort claim against the County and its employees for faulty inspections before issuance of certificates of occupancy. Such a tort claim does not give rise to a claim under 42 U.S.C. §1983. Paul v. Davis, 424 U.S. 693, 96 Supr. Ct. 1155, 47 L. Ed. 2d 405 (1976).

CONCLUSION

Respondents respectfully request this Honorable Court deny the plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

BERG, HECKLER & CATTIE, P.A.

BY: _____

HOWARD M. BERG
Attorney for Respondents
One Customs House Square
Customs House Plaza
Wilmington, DE 19801

DATED:

A P P E N D I X

APPENDIX

TABLE OF CONTENTS

	PAGE
Delaware Laws	
56 Del. Laws, Ch. 408	A-1
New Castle County (NCC) Code	
NCC Code §5-1	A-2
NCC Code §5-2(h.1) 112.3	A-3

DELAWARE LAWS

56 Del. Laws, Chapter 408.

AN ACT TO AMEND CHAPTER 83, TITLE 16, DELAWARE CODE, RELATING TO COUNTY BUILDING CODES, PLUMBING CODES, ELECTRICAL CODES AND SIMILAR CODES, AND PROVIDING FOR REASONABLE FEES FOR THE ENFORCEMENT THEREOF.

Be it enacted by the General Assembly of the State of Delaware:

Section 1. Amend Chapter 83, Title 16, Delaware Code by adding thereto a new section to read:

§8329. Promulgation of building, plumbing, electrical and other codes; building permits; fees

The Levy Courts of the several counties and the County Council of New Castle County may adopt and enforce building codes, plumbing codes, electrical codes or other similar codes, as a basis for determining whether or not

building permits shall be issued. The said Levy Courts and County Council may charge reasonable fees for the enforcement of said code.

Approved July 26, 1968.

NEW CASTLE COUNTY (NCC) CODE

Sec. 5-1. Building code--Adopted.

Certain documents are on file in the office of the clerk of county council being marked and designated as the BOCA Basic Building Code 1978, Seventh Edition, as published by the Building Officials Conference of America, Inc., be and are hereby adopted as the building code of the county, for the control of buildings and structures as herein provided. All of the provisions, penalties, conditions and terms of the BOCA Basic Building Code 1978, Seventh Edition, are hereby referred to, adopted and made a part hereof, as if fully set

out in this section, with the additions, insertions, deletions and changes prescribed in section 5-2.

NCC Code §5-2(h.1) 112.3. Add a new subsection as follows:

112.3. BY WHOM APPLICATION IS MADE. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either, or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant, and of the responsible officers, if the owner or

lessee is a corporate body, shall be stated in the application. If the applicant is a corporation, partnership, joint venture or any entity other than a natural person, the principals of the applicant shall be disclosed and at least one of the principals shall be a signatory to the application for a permit. A principal for purposes of this section shall be defined as a director and/or officer and/or shareholder of a corporation; or anyone with an interest of five (5) per cent or greater in a partnership or joint venture.

FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROSEMARIE C. WOOTERS, ET AL.,
Petitioners,

v.

MARY D. JORNLIN, ET AL.,
Respondents.

RESPONSE OF MARYLAND NATIONAL BANK TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL V. NIEMEYER,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
301-539-2530.

The Daily Record Co., Baltimore, MD 21202

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STATEMENT OF THE CASE

The District Court dismissed this case against Maryland National Bank deciding, in its discretion, not to exercise pendent jurisdiction. Its opinion is reported at 477 F. Supp. 1140.

Maryland National Bank also based its motion to dismiss before the District Court on a lack of venue. As a national bank chartered with its place of business in Maryland, venue does not lie against it in the District of Delaware. 12 U.S.C. § 94; *Radzanower v. Touche Ross and Company,* 426 U.S. 148, 152 (1976).

In an unreported per curiam opinion, the United States Court of Appeals for the Third Circuit affirmed, finding no abuse of discretion. The affirmance is reported at 622 F.2d 580 and the entire decision is set forth in petitioners' appendix, page A-1.

SUMMARY OF REASONS FOR DENYING THE PETITION

The petitioners fail to set forth any issue, argument or prayer to indicate any conflict with the decisions of the District Court and the Third Circuit as to Maryland National Bank. For these reasons, the petition should be denied.

ARGUMENT

In the petition, the petitioners seem to abandon any challenge of the District Court's decision and the Third Circuit's affirmance as to Maryland National Bank. They say at page 14:

> "Under principles of pendent jurisdiction plaintiffs also asserted various state law claims against Mr. Real Estate, the developer of Brookmont Farms and against Maryland National Bank, which supplied construction and permanent financing for the project. *Full exposition of these pendent jurisdiction claims is not necessary in this petition.*" (Emphasis added).

No issue, argument or prayer is directed to Maryland National Bank and no further statement is made about it.

For these reasons Maryland National Bank prays that the petition be denied.

CONCLUSION

This case was correctly decided as to Maryland National Bank by both the District Court and the Third Circuit. Petitioners provide no reason for this Court tc exercise its powers of review as to Maryland National Bank, and the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL V. NIEMEYER,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
301-539-2530.